Supreme Court, U.S.
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No. 97-1149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Petitioner,

v.

MORAN TRADE CORPORATION OF DELAWARE,
MORAN TOWING OF VIRGINIA, A DIVISION OF
MORAN MID-ATLANTIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Respondent disagrees with Petitioner's Statement of Questions Presented for Review in that the District Court and Fourth Circuit opinions did not hold that there was preemption of state statutory and common law remedies by OPA 90. This was not a preemption case, but rather an interpretation and application of federal and state statutes to the specific facts of this maritime collision and resultant oil spill.

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COUNTER-STATEMENT OF DISTRICT COURT JURISDICTION

Petitioner asserts that Jurisdiction in the District Court was grounded on 28 U.S.C. §§ 1331, 1332 and 1333. This statement is correct as to §1331 and §1333, however §1332, diversity jurisdiction, was never alleged as a basis of jurisdiction nor did the District Court find jurisdiction on that basis. The Petitioner, National Shipping Company of Saudi Arabia ("NSCSA"), filed this action in federal court as ". . . an admiralty and maritime claim within the meaning of 28 U.S.C. §1333 (1994) and Rule 9(h) of the Federal Rules of Civil Procedure," and under the Oil Pollution Act of 1990 (OPA 90) 33 U.S.C. §§2701 *et seq.*[1]

The District Court recited the basis for jurisdiction in its decision: "This matter falls within the Court's federal question and admiralty jurisdiction. See 28 U.S.C. §§1331 and 1333."[2]

COUNTER-STATEMENT OF THE CASE

Respondent agrees with the facts set forth in petitioner's Statement of the Case, ("B - Procedural History"), except as set forth below.

NSCSA sought in its Complaint, as later amended, to recover from Respondent under five theories: (1) general maritime law, (2) Virginia State Water Control Law, (3) Virginia common law, (4) OPA 90 and (5) the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251

[1] Second Amended Verified Complaint, Appendix p. A-1. *Note* that references to the Appendix to the Brief in Opposition are designated as hyphenated page numbers. References to the Appendix to the Petition follow the same page designations as used by Petitioner, *e.g.* "1a".

[2] Opinion of District Court, Appendix B, p. 29a.

et seq. Respondent filed a Motion to Dismiss the claims under the Virginia State Water Control Law and under the FWPCA on the basis that neither Act by its own terms could provide Petitioner a cause of action against Respondent to recover the response costs it incurred. The District Court agreed and dismissed these two statutory claims by its order and opinion of August 14, 1995. Appendix E, p. 62a.

The remainder of the case was tried in January 1996 and the Court issued its Opinion on April 25, 1996. The District Court found Moran liable for the collision, but held that the limitation provisions of OPA 90 limited Petitioner's recovery to approximately half of the proven damages – $500,000. In its Opinion, the District Court did not revisit the state pollution statute except to observe that the claims based upon the statute had been dismissed.[3] In considering the claims asserted under state common law, the Court found that Petitioner as the owner of a spilling vessel was not in the class of victims that OPA was designed to benefit, and that under these facts where Petitioner's entire liability and damages were circumscribed by OPA 90 and its own limitation amount had never been exceeded, that state common law was not available to avoid the limitation set by OPA for a third party.

Most importantly though, this is not a case of preemption of state law. The District Court never said state law was preempted by OPA 90 as Petitioner asserts. Rather, the District Court's ruling was dictated by the unique facts of this case. The District Court held only that this plaintiff, whose vessel spilled the oil and who thereby is strictly liable, under this set of facts where plaintiff's

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[3] Opinion of District Court, Appendix B, p. 34a.

liability arose solely from the provisions of OPA 90, may not avoid the third party limitation provisions of OPA 90 by claiming under state common law unless state common law claims asserted against it exceed its own OPA limitation amount. The District Court never ruled that state law was preempted by OPA 90, and its Opinion of April 25, 1996 never considered state statutory law.

The Fourth Circuit affirmed *per curiam.*

REASONS FOR DENYING THE PETITION

The Petitioner seeks a Writ of Certiorari on the basis of what it terms was the "implied finding" of the District Court that the Petitioner was preempted from asserting state and common law claims on the basis of OPA 90. It argues that this Court should grant review for essentially three reasons. First, the decision conflicts with the plain language of section 2718 of OPA 90. (Petition at p. 7). Next, it argues that the decision conflicts with the holding of the First Circuit Court of Appeals in *In re Ballard Shipping.*[4] (Petition, p. 7). And finally, that the decision creates confusion for shipowners. (*Id.* pp. 9-10, 13). None of these grounds are substantiated in the record. For the reasons set forth in greater detail below, this Court should deny review.

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[4] *Ballard Shipping Co. v. Beach Shellfish,* 32 F.3d 623 (1st Cir. 1994).

I.
THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE INTERPRETATION OF OPA 90.

The Rules of the United States Supreme Court outline in Rule 10 the considerations that will serve as a guide for considering a petition for a writ of certiorari.[5] The principal considerations are whether there are conflicts among the circuits on the particular issue, whether a federal circuit court has decided a significant question of federal law that conflicts with rulings by this Court, and whether the Supreme Court's action on the matter is required by virtue of its supervisory role over the federal judiciary. Respondent submits that none of these criteria can be applied to the instant matter to justify a review of the Fourth Circuit decision by this Honorable Court.

There is no conflict among the circuits inasmuch as this is the only District Court and Circuit Court to interpret the contribution and limitation provisions of the Oil Pollution Act of 1990.[6] To the extent other circuits

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[5] Rule 10 lists the following as representative of "the character of the reasons the Court considers:

(a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

[6] 33 U.S.C. §§2702, 2704, 2709 (1994).

have interpreted §2718, it has never been in the context of limitation, contribution, common law or from the unique factual standpoint of the present case.

The petitioner frequently refers to the issue of preemption of "state law or common law," which insinuates state *statutory* law and common law. However, the state statutory pollution law was interpreted by the District Court on motion, and the Petitioner's claim dismissed based on the language of the state statute, not by preemption, by Judge Clarke's order of August 14, 1995.[7]

In the April 25, 1996 post-trial Opinion, District Court Judge Smith stated plainly that state statutory law was not an issue before her:

> This Court has already ruled, in its Order granting in part Moran's Motion to Dismiss, that NSCSA may not recover its response costs and amounts paid to third parties under Virginia State Water Control law. The only claims left to be considered, therefore, are those brought pursuant to *Virginia common law.*

Opinion of District Court, Appendix B, p. 34a. (emphasis added).

And, while the Court recognized at the beginning of its Opinion that the August 14, 1995 Order preserved to NSCSA the right to recover pollution damage sustained to its own property under the Virginia Water Control law, NSCSA did not offer any evidence on that point.[8] The District Court held, and the Fourth Circuit affirmed, that as to the owner of a vessel that spills oil, the lim-

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[7] Opinion of the District Court, Appendix B, p. 15a.

[8] NSCSA did prove and obtain a judgment for collision damages in the amount of $19,300 under the general maritime law, not the State Water Control law. Opinion of the District Court, Appendix B, p. 49a.

itation provisions of OPA 90 must be exceeded by state law claims before state law remedies may be resorted to. The holding can only be interpreted to apply to state common law, since that was the only substantive state law being interpreted by the District Court when it issued this decision. To the extent NSCSA seeks to read the decision to apply to state statutory law, its argument must be rejected.

It is for this reason that the decisions cited by the Petitioner are inapposite. The *Ballard Shipping*[9] case involved interpretation of a Rhode Island pollution statute providing for recovery of economic losses *prior* to the passage of OPA 90. While the court spoke in broad terms about OPA 90 and common law, the case involved neither. Rather, the legal issue before the court was whether a judicially created doctrine in the general maritime law, the "Robins Drydock rule", preempted remedial state legislation for oil pollution damages. By contrast, the present case involves a federal statute, state common law, and no preemption holding.

Likewise, the *Askew*[10] and *Huron Portland Cement*[11] cases predated OPA 90 and involved application of specific state legislation – not common law. The *Intertanko*[12] and *Berman*[13] cases again applied state legislation and did not consider issues of common law. None

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[9] *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994).

[10] *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

[11] *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

[12] *Intertanko v. Lowry*, 947 F. Supp. 1484 (W.D. Wa. 1996).

[13] *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992), *aff'd*, 3 F.3d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994).

of the cases arose under the unique facts of the present case – where the claimant who was strictly liable for the pollution expenses it incurred (which expenses were less than its OPA limitation cap) is seeking to impose liability on a third party that exceeds that party's OPA limitation cap. Moreover, it seeks to accomplish this by applying state common law in a maritime collision action filed within the federal court's admiralty jurisdiction.

II.
THE DECISION BELOW HAS NOT GENERATED CONFUSION AMONG SHIPOWNERS OR THE COURTS.

Petitioner argues that this decision has led to confusion over responsibility for pollution cleanup and that it is important to clear up this issue as soon as possible.[14] To add urgency Petitioner recites the number of barrels of oil imported daily and the number of ship docking calls by oil tankers – both of which are absolutely irrelevant. Not only was the M/V SAUDI DIRIYAH not a tanker, but there has not been a major oil spill involving negligent tugs in a ship docking operation in recent memory. None of the incidents recited in Petitioner's brief involved a ship docking casualty. The high number of annual dockings without pollution incidents is, if anything at all, a reason *not* to have concern.

Not only has there been no evidence of confusion regarding cleanup responsibility, no evidence has been

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[14] Petition p. 9.

cited of legal confusion either. Nearly two years have elapsed since the District Court decision in this case, and it has yet to be cited in a reported decision except for its ruling on prejudgment interest.[15]

This case is better characterized as having an absence of precedential value rather than creating the "confusion" that the petitioner laments is pervasive. Page 1 of Petitioner's brief contains a telling recital of the *unpublished* orders and decisions from which relief is sought in this case:

1. Order of August 14, 1995 dismissing the Virginia State Water Control Act cause of action;
2. Order of August 18, 1995 denying Motion for Reconsideration;
3. Order of May 29, 1996 denying Motion for Reconsideration;
4. Opinion of the Fourth Circuit dated September 9, 1997;
5. Order of October 6, 1997 denying rehearing and rehearing *in banc*.

Most notably, the per curiam opinion of the Fourth Circuit specifies on its face that it is both unpublished ("Affirmed by opinion ordered not published.") and may not be cited as precedent ("Such opinions are not binding precedent in this circuit"). These statements have been deleted from the Appendix copy attached to the Petition at page 1a. A faithfully reproduced copy of the caption of the slip opinion is attached in the appendix to this brief. Appendix B, p. A-3.

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[15] *Cement Division, Nat'l Gypsum Co. v. City of Milwaukee*, 950 F. Supp. 904 (E.D. Wis. 1996).

More significant is the reality that *this* case could not influence the effectiveness and speed of a cleanup regardless of how it is decided. Besides being an unreported and non-precedential decision to this level, the facts of the case are narrow, do not have widespread application, and do not bear on the real incentives that drive and require immediate and complete response to a spill – onerous financial and criminal penalties. A failure to clean up a spill after being designated Responsible Party by the Coast Guard will result in loss of the right to limit liability.[16] In addition, owners or operators of craft which pollute are subject to civil penalties of $25,000 per day of violation.[17] And, if they fail to properly clean up the spill they may be subject to an additional civil penalty of $25,000 per day, or three times the cost incurred by the National Trust Fund.[18]

In order to insure that shipowners are able to respond to and pay for a spill, shipowners are required by OPA to provide Certificates of Financial Responsibility from the insurance groups or clubs that underwrite pollution liability for every inspected vessel that trades in the United States.[19] Moreover, vessel owners are required to have "Oil Spill Response Plans" in place to facilitate immediate response when a spill occurs.[20] These are both part of the comprehensive statutory scheme established through the passage of OPA 90.

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[16] 33 U.S.C. §2704(c)(2).

[17] 33 U.S.C. §1321(b)(7).

[18] 33 U.S.C. §1321(e)(1).

[19] 33 C.F.R. §§130 *et seq.*

[20] 33 C.F.R. §§155.1010 *et seq.*

In short, vessel owners and managers will continue to react promptly to oil spills regardless of how liability and limitation are resolved in this particular case.

III.
OPA 90 IS A COMPREHENSIVE STATUTORY SCHEME WHICH WAS PROPERLY INTERPRETED BY THE LOWER COURTS.

A. OPA 90 Is a Comprehensive Scheme for Oil Pollution Damages.

In enacting OPA 90, Congress established a comprehensive scheme for determining oil pollution liability under federal law, motivated primarily by the perceived deficiencies in the then-existing patchwork of statutes and maritime law.[21] By expressly preempting the Limitation of Liability Act of 1851 for oil pollution liability, and providing that liability under OPA was established "notwithstanding any other provision or rule of law...," 33 U.S.C. §2702(a) (1994), Congress intended that OPA would be a comprehensive, coherent, and uniform approach to federal liability for oil pollution. The legislative history is replete with references to the preeminent position OPA was intended to serve in eliminating the patchwork of federal rules on oil pollution:

> It is important to note that following enactment of this Act, liablity and compensation for petroleum oil pollution damages caused by a discharge from a vessel or facility will be determined in accordance with this Act.

S. Rep. No. 94, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 746.

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[21] Before OPA, five different federal statutes dealt with oil pollution liability and compensation. Congress found all to be inadequate. S. Rep. No. 94, 101st Cong., 2d Sess. 3, *reprinted in* 1990 U.S. Code Cong. & Admin. News 722, 724.

> Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the Act of March 3, 1851 (46 U.S.C. §183 (1994 and Supp. 1996)), or under existing requirements that physical damage to the proprietary interest of the claimant be shown.

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 781.

Thus, it is clear that, in increasing the limits of liability over the existing FWPCA provisions, expanding the scope of statutory claims to include private parties as well as the United States, and providing for a statutory fund to compensate injured parties, Congress intended OPA 90 to be *the* federal remedy for oil pollution damages.

The effect that such comprehensive legislation has upon the general maritime law and other causes of action is illustrated by *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979), dealing with similar provisions in OPA's predecessor, the Federal Water Pollution Control Act (FWPCA). Section 311(f) of the FWPCA (33 U.S.C. §1321(f)) provided that "the . . . owner or operator of any vessel from which oil or a hazardous substance is discharged . . . shall, *notwithstanding any other provision of law,* be liable to the United States Government for the actual costs incurred . . . in removal of the oil." (emphasis supplied)

In *Steuart Transportation,* the United States claimed entitlement to response costs under the FWPCA, maritime tort, common law nuisance, and the Rivers and Harbors Act of 1899 (33 U.S.C. §407 (1994)). The Fourth Circuit held that FWPCA §311(f) was the United

States' exclusive cause of action for recovery of those response costs.

Other courts have followed similar reasoning. *See In re Oswego Barge Corp.*, 664 F.2d 327, 340, *reh'g denied*, 673 F.2d 47 (2d Cir. 1981); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 738 (5th Cir. 1980); *Frederick E. Bouchard, Inc. v. United States*, 483 F. Supp. 477 (D. Mass. 1984).

Congress provided in OPA an even more comprehensive scheme for oil pollution liability than existed in the FWPCA. OPA expanded the definition of statutory damage and response costs, and made the cause of action to recover them available to both governmental and private party claimants.[22]

Significantly, OPA 90 also provides a comprehensive scheme for third party liability, which was missing from FWPCA. The pre-existing FWPCA §311(g) (33 U.S.C. §1321(g)) allowed only the United States to pursue a statutory right of recovery for response costs against third parties. Private parties were left to general maritime law claims against third parties, preserved under 33 U.S.C. §1321(h)(1), because there was no statutory right of recovery provided to private parties.[23] However, OPA 90 expanded the scope of third parties' statutory liability and limitation of liability over that provided in FWPCA §311. First, 33 U.S.C. §2702(d) (1994) specifically provides for third party liability. Second, unlike FWPCA §311, statutory actions for response

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[22] *Compare* 33 U.S.C. §2702 (1994) with 33 U.S.C. §1321 (1994 and Supp. 1996).

[23] In fact, private parties had no statutory cause of action under FWPCA §311. OPA has given private parties the same comprehensive remedies as are available to the government.

costs against "sole fault" third parties under OPA are available to private parties as well as to the federal government. Finally, even for those third parties that are not sole fault third parties within the meaning of §2702(d)(1)(A), OPA 90 provides for a statutory contribution action against any other person who is liable or potentially liable under this Act or another law, and provides that the contribution action shall be brought in accordance with OPA's litigation, jurisdiction, and venue provision. 33 U.S.C. §2709 (1994).

In light of OPA 90's comprehensive scheme for all oil pollution claims, these same principles of statutory interpretation dictate that OPA 90 provides the sole basis under federal law for recovery of response costs and damages against *third parties,* as well as responsible parties. The detail and scope of these third party liability provisions in OPA 90 create a presumption that Congress intended OPA 90 to be the exclusive remedy against third parties for oil pollution that displaces any conflicting general maritime law theories of liability.[24]

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[24] In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990), the Supreme Court endorsed the concept of legislative preemption of general maritime law, stating:

> In this era, an admiralty court should look primarily to . . . legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies, consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

B. Moran's Limit of Liability is $500,000 Under OPA 90.

Consistent with the intent to provide a comprehensive approach to liability, including third party liability, OPA 90 has specifically provided a limitation of liability for third parties whose acts cause or contribute to an oil spill. Section 2704(a) provides "the total liability of a responsible party *under section 2702 of this title* and *any removal costs*[25] incurred by, or on behalf of the responsible party, with respect to each incident shall not exceed . . . [the specified limitation amount]" (emphasis added). Section 2702(d)(2)(A) provides that a third party whose act or omission causing an oil pollution incident occurs in connection with the operation of a vessel is entitled to limit its liability to the amount provided in §2704 with respect to that vessel. At a displacement of 252 Gross Registered Tons, the HARRIET MORAN's limit of liability under §2704(a)(2) is $500,000.

C. OPA 90 Does Not Create State Common Law Remedies That Are Preempted by Federal Maritime Law in a Marine Collision Suit.

The District Court never reached the issue of whether common law causes of action are preempted by the general maritime law in a marine collision action, but had it done so, it would have denied NSCSA's common law claim on that basis. A collision matter is perhaps the

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[25] Since OPA removal costs are included within §2702, the additional reference to "and any removal costs" clearly indicates that the limitation provisions of OPA were intended to be comprehensive, and include any removal costs even if not presented in an OPA claim. Otherwise the language would be mere surplusage.

clearest example of a case requiring application of the general maritime law within the court's admiralty jurisdiction.[26] Determination of liability is based upon duties imposed by the navigational rules of the road[27] and the doctrine of unseaworthiness, while a comparative negligence rule applies to apportion liability rather than the common law (Virginia) rule of contributory negligence. Moreover, under the general maritime law a vessel has *in rem* liability which NSCSA alleged in this case.[28]

It is well settled that federal district courts hearing cases within their admiralty jurisdiction will apply the general maritime law. *See Maryland Department of Natural Resources v. Kellum,* 51 F.3d 1220, 1224 (4th Cir. 1995); *Mullenix v. United States,* 984 F.2d 101, 104 (4th Cir. 1993); *Meaige v. Hartley Marine Corp.,* 925 F.2d 700, 702 (4th Cir. 1991), *cert. denied,* 501 U.S. 1217 (1991).

NSCSA complains that the District Court decision re-writes 33 U.S.C. § 2718(a)(2)[29] to deny the availability of common law remedies where two vessels are involved in a spill, and where damages do not exceed the OPA limitation fund of the spilling vessel. NSCSA's interpretation of §2718(a)(2) is essentially that, by this one phrase at the end of a subsection devoted to the relationship between OPA 90 and the Solid Waste Disposal

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[26] *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982).

[27] The Inland Rules of the Road have been codified at 33 U.S.C. §§2001, *et seq.* 1994).

[28] Appendix A, p. A-1.

[29] For clarity, it should be noted that 33 U.S.C. §2718 (1994) is titled "Relationship to Other Law." As noted in the text, 33 U.S.C. §2751 (1994) is titled "Savings Provision."

Act (42 U.S.C. §§6901 *et seq.* (1994), Congress overruled the well-established principles of supremacy of the federal maritime law over state common law in admiralty cases, and "revived" the unfettered application of state common law to maritime oil spills. NSCSA's contention is illogical and inconsistent with other provisions of OPA 90.

First, it is appropriate to note that OPA 90 does not apply only to maritime cases. It applies equally to an oil spill from an onshore facility that reaches the navigable waters of the United States. State common law may well have some application in such non-admiralty case.

Second, NSCSA's contention is inconsistent with the plain language of OPA 90's "Savings Provision," 33 U.S.C. §2751(e)(1994) which states:

> (e) Admiralty and maritime law.
>
> Except as otherwise provided in this chapter, this chapter does not affect –
>
> (1) admiralty and maritime law; . . . .

Third, NSCSA's position is inconsistent with the limitation of liability scheme clearly and carefully crafted in OPA 90, including the limitation granted to third parties who may have caused a spill. *See* 33 U.S.C. §2704 (1994 and Supp. 1995), discussed *supra.* If NSCSA is free to recover under any common law theory, the limitation of liability provisions of OPA 90 are meaningless. It was on the basis of this analysis that the court in *Steuart Transportation, supra,* held the United States could not avoid the limitation provisions in the FWPCA by bringing suit under a common law nuisance theory.

Finally, NSCSA's interpretation is at odds with the legislative history of this section. The relevant words that yield the true intent of this section and relied upon

by the District Court are emphasized in the following Senate Report:

> The theory behind the [savings clause] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection *for its own resources and citizens* is entitled to do so.

(Opinion of District Court, Appendix B, p. 35a, *quoting* Senate Report) (emphasis added).

The premise of the District Court holding is that OPA 90 is designed to require all vessel operators, regardless of fault, to be fully financially responsible for oil spills from their vessels. These are the potential polluters. The beneficiaries of OPA 90 are the environment and citizens damaged by spills of oil. These are the potential victims. The savings provisions of OPA allow the states to further protect their *resources and citizens* – the "victims" – but are not intended to provide additional causes of actions to vessel operators whose rights and liabilities are carefully set out in OPA 90's comprehensive legislative scheme, including a cause of action for contribution between strictly and jointly liable parties.

In a case involving similar statutory remedial schemes under other environmental laws, the Supreme Court recently stated:

> As we explained in *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 14, (1981), where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by

> implication additional judicial remedies for private citizens suing under" the statute. "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.*, at 14-15 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).

These principles of statutory construction indicate that in this case as well, this Court should adhere to the clear scheme for third party liability, including its limitation of liability, provided in OPA 90.

CONCLUSION

The District Court and Fourth Circuit correctly held that Moran is entitled to the OPA limit of liability and that Petitioner has no further avenue of relief in this case through state common law. There do not exist conflicts among the circuits or other characteristics of this case which would support a grant of a writ and the Petition should be denied.

Respectfully submitted,

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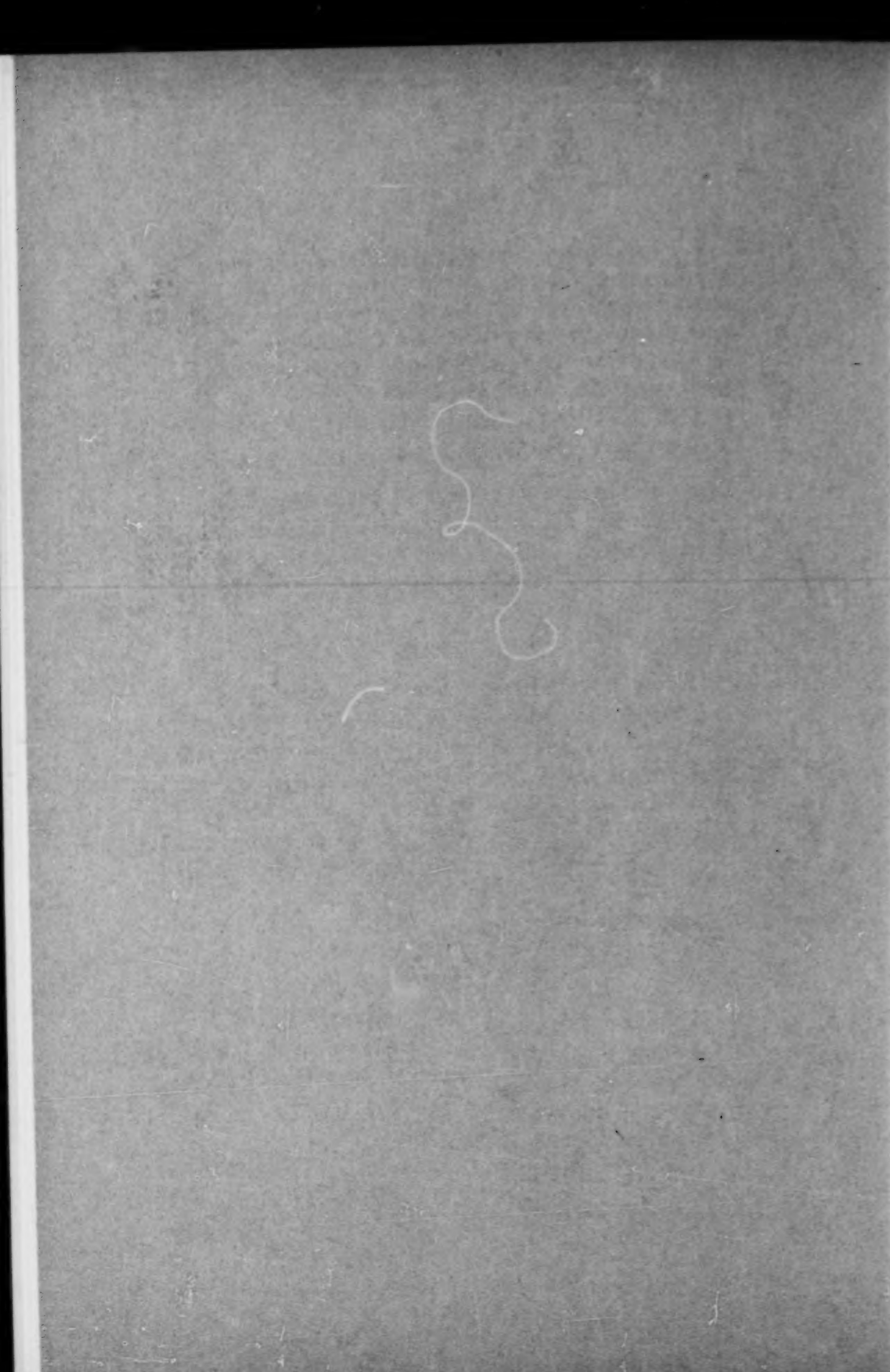
February 11, 1998



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:95-CV-258

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN MID-ATLANTIC CORPORATION,
in personam,

and

MORAN TRADE CORPORATION OF DELAWARE,
in personam,

and

MORAN TOWING OF VIRGINIA, INC., a
Division of MORAN MID-ATLANTIC CORPORATION,
in personam,

and

M/V HARRIET MORAN,
her engines, tackle, apparel, etc., *in rem,*

Defendants.

SECOND AMENDED VERIFIED COMPLAINT

The Verified Complaint of National Shipping Company of Saudi Arabia ("NSCSA"), plaintiff, by counsel, as and for its Verified Complaint against Moran Mid-Atlantic Corporation ("Moran Mid-Atlantic"), *in personam*, and Moran Trade Corporation of Delaware ("Moran Delaware"), *in personam*, and Moran Towing of Virginia, Inc. ("Moran Towing"), *in personam*, and the M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*, defendants, allege, on information and belief, as follows:

JURISDICTION

1. This is an admiralty and maritime claim within the meaning of 28 U.S.C. §1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

2. Jurisdiction and venue are also proper in accordance with the Oil Pollution Act of 1990, 33 U.S.C. §2701, *et seq.*

THE PARTIES

3. The plaintiff incorporates by reference paragraphs 3 through 11 of the Verified Complaint.

* * *

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1741

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Plaintiff-Appellant,

v.

MORAN TRADE CORPORATION OF DELAWARE,
in personam; MORAN TOWING OF VIRGINIA,
INCORPORATED, a division of Moran
Mid-Atlantic Corporation,

Defendants-Appellees.

No. 96-1824

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Plaintiff-Appellee,

v.

MORAN TRADE CORPORATION OF DELAWARE,
in personam; MORAN TOWING OF VIRGINIA,
INCORPORATED, a division of Moran
Mid-Atlantic Corporation,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge; J. Calvitt
Clarke, Jr., Senior District Judge; Tommy E. Miller,
Magistrate Judge,
(CA-95-258-2)

Argued: June 3, 1997

Decided: September 9, 1997

Before HALL and MICHAEL, Circuit Judges, and
TILLEY, United States District Judge for the
Middle District of North Carolina,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John R. Crumpler, Jr., KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant, Mark Travis Coberly, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Appellees. ON BRIEF: Megan A. Burns, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant. Patrick A. Genzler, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Plaintiff National Shipping Co. of Saudi Arabia (NSCSA) brought an action against defendants Moran Trade Corporation of Delaware, Moran Towing of Virginia, Moran Mid-Atlantic Corporation, and the M/V HARRIET MORAN (collectively "Moran") in an effort to recoup its expenses in the cleanup of an oil spill on the Elizabeth River outside Norfolk, Virginia. The district court determined that Moran was negligent and that this negligence was the sole cause of the spill. The court therefore found Moran liable for the costs of the cleanup under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §2701 *et seq.* However, the court limited Moran's liability under OPA to $500,000 (roughly half the cost of the cleanup). Finally, the court held that NSCSA could not recoup the excess costs through exceptions to the liability cap or through state law claims. NSCSA appeals from this limitation on Moran's liablity, and Moran cross-appeals from the court's determination that it was negligent. Finding no error, we affirm.

I.

This case involves an accident between a tugboat and a cargo vessel. The cargo vessel SAUDI DIRIYAH, owned by NSCSA, was docked at Norfolk International Terminals on the Elizabeth River. On the night of December 1, 1993, the vessel was to undock and move upstream to different docks. NSCSA contracted with Moran to provide two tugboats to assist in the move; it also contracted with docking pilot John Morey to oversee the move.

After breasting away from the pier, the SAUDI DIRIYAH made a series of turns to maneuver up the river. To

make these turns, the vessel used bow and stern thrusters that were mounted on the side. At some point during the turn, William Lusk, the captain of the tugboat HARRIET MORAN, brought the tug in on the SAUDI DIRIYAH's port quarter to assist with the turn into the channel. However, when the boats made contact, one of the tug's quarter bitts struck the SAUDI DIRIYAH's hull and opened a gash in the vessel's fuel oil tank. Oil began spilling into the river and continued to flow for the next two hours as the vessel moved upstream and docked.

Approximately 9,000 gallons of oil leaked into the river from the spill. The cleanup was directed by the United States Coast Guard, which designated NSCSA as the "responsible party" under the OPA. NSCSA thus arranged and paid for all of the cleanup. NSCSA paid roughly $870,000 to those engaged to remove the oil, and it also paid $106,806.12 to settle claims of those whose property was damaged by the spill. In addition, the Coast Guard and the United States Navy incurred about $300,000 in costs, which these agencies are seeking to recover from NSCSA.

NSCSA brought an action in the United States District Court for the Eastern District of Virginia, claiming that Moran's negligence was the cause of the spill. NSCSA brought claims under OPA, the Virginia Water Control Law, and state common law. The Water Control Law claim was dismissed before trial. After a bench trial the district court found that Moran was negligent and that this negligence was the sole cause of the accident. The court therefore granted relief under OPA, but it determined that OPA §1004(a)(2) capped Moran's damages at $500,000. The court also concluded that none of the exceptions to this cap applied and that NSCSA could not circumvent the cap through its state

law claims. However, under general maritime law the court awarded NSCSA $3,250 for the lost fuel and $16,050 for the damage to the hull. The court also awarded prejudgment interest. *See National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436 (E.D. Va. 1996).

NSCSA appeals from the district court's denial of its claims for relief under state law and from the finding that none of the exceptions to OPA's damages cap applies. Moran appeals from the district court's conclusion that Moran's negligence caused the spill.

II.

We turn first to Moran's cross-appeal. Moran contends that the district court erred in holding it liable under OPA §1002 for the cleanup of the oil spill. Section 1002(a) establishes that the "responsible party" will be liable for the removal costs and damages of a spill. *See* 33 U.S.C. §2702(a). Under §1001(32)(A) the responsible party is defined as the owner or operator of the vessel which actually discharges the oil. Since NSCSA is the "responsible party" with regard to the SAUDI DIRIYAH, NSCSA was liable for the cleanup. Under §1002(d)(1), however, the responsible party can reassign liability to a third party if the responsible party "establishes that [the] discharge . . . and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties." 33 U.S.C. §2702(d)(1). The district court found that Lusk, who as captain of the tug was serving as Moran's agent, acted negligently during the maneuver; the court further found that this negligence was the sole cause of the accident. Therefore, the court concluded that Moran was liable for the costs of the cleanup under §1002(d)(1). We

review the district court's factual findings only for clear error. *See Waters v. Gaston County*, 57 F.3d 422, 425 (4th Cir. 1995).

Moran contends that the accident was caused not by its negligence but rather by the negligence of Morey, the docking pilot hired by NSCSA. According to Moran, Morey failed to alert Lusk that the SAUDI DIRIYAH was changing the direction of its turn, and this failure to alert misdirected Lusk, causing him to approach the SAUDI DIRIYAH at the wrong spot. The district court, however, found that Lusk had failed to exercise proper control over his vessel during the course of the maneuver. *See NSCSA*, 924 F. Supp. at 1452. Having reviewed the evidence and the district court's findings, we do not believe that the district court clearly erred in finding that Moran was negligent.

III.

We next examine NSCSA's contentions that the district court erred in limiting Moran's liability under OPA's damage cap. Section 1002(d)(2)(A) of OPA states that "[i]f the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of the title as applied with respect to the vessel or facility." 33 U.S.C. §2702(d)(2)(A). Section 1004(a)(2) puts the damages cap for any vessel other than a tank vessel at "$600 per gross ton or $500,000, whichever is greater." 33 U.S.C. §2704(a)(2). Since the tugboat weighed only 252 gross tons, the district court limited Moran's liability under OPA to $500,000. *See NSCSA*, 924 F. Supp. at 1447. NSCSA attempts to get

around this cap in two ways: it argues (a) that OPA's exceptions to the cap apply and (b) that it can recover the excess amount through state law claims under the Virginia Water Control Law and state common law. We take these arguments in turn.

A.

A party's liability may exceed the damages cap in OPA §1004(a) if it falls into one of the exceptions in §1004(c). The cap does not apply if the party committed "gross negligence or willful misconduct" or "violat[ed] . . . an applicable Federal Safety, construction, or operating regulation." 33 U.S.C. §2704(c)(1). NSCSA contends that Moran, through its agent Lusk, violated one of the applicable federal safety regulations, namely, the Inland Navigational Rule, That rule provides:

> Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 U.S.C. §2005. On the night of the accident, Lusk was acting as his own lookout. NSCSA contends that the absence of an additional designated lookout violated §2005. Whether a special lookout was necessary is a question of fact which we review for clear error. *See C.G. Willis, Inc. v. The Spica,* 6 F.3d 193, 196, 197-98 (4th Cir. 1993).

The district court made the following findings of fact in determining the lack of need for a separate lookout:

> On the night of December 1, 1993, the sky was clear and calm. . . . [Captain Lusk] testified that he had an almost complete view of his surroundings through the windows of his wheelhouse. The

> HARRIET MORAN was laying a short distance off the port quarter of M/V SAUDI DIRIYAH. Captain Lusk testified that he had the best possible view of the ship from the wheelhouse. It does not appear that a separate lookout would have been of much assistance to the Captain.

NSCSA, 924 F. Supp. at 1451. These findings of fact are not clearly erroneous.[1]

B.

NSCSA also claims that it can avoid OPA's damages cap by bringing claims under the Virginia Water Control Act and state common law. The Water Control Act provides that "[a]ny person discharging or causing or permitting a discharge of oil into or upon state water . . . shall be liable to [a]ny person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, cause by such discharge." Va. Code. Ann. §62.1-44.34: 18(C)(4). NSCSA claims that this section enables it to recover its response costs under OPA as property dam-

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[1] NSCSA argues that Lusk admitted the need for a lookout during his deposition. When asked "Did you have a lookout posted?", Lusk responded that "[t]he engineer at the time of the undocking would have been my lookout." J.A. 115. During his trial testimony, however, Lusk explained that the engineer "would have been [the lookout], if I inquired of him, requested him to be a lookout." J.A. 90. We do not interpret Lusk's deposition testimony as an admission of the need for a separate lookout.

NSCSA also contends that even if Lusk could have served as an adequate lookout on his own, he failed to do so on the night of the accident. However, NSCSA fails to present any evidence that would warrant such a conclusion.

age or economic losses. NSCSA also seeks to bring Virginia common law indemnity and subrogation claims in order to collect its OPA expenses. In essence, NSCSA wants to use state law to collect the costs that it incurred as the OPA "responsible party" in excess of the $500,000 liability cap.

We conclude, however, that OPA prevents NSCSA from using state law to collect damages under OPA that exceed OPA's liability cap. OPA §1004(a) specifically provides:

> Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed [the limitations set forth therein].

33 U.S.C. §2704(a) (emphasis added). NSCSA is liable for the costs of the spill solely under OPA §1002, and Moran is liable for those costs solely under §1002. Thus, the total of Moran's exposure under OPA cannot exceed $500,000.[2] The only exceptions to this cap are those set forth in §1004 itself.

NSCSA claims that OPA does not limit NSCSA's ability to collect its excess liability under OPA through state law claims. It cites OPA §1018(a)(2), which states that "[n]othing in this chapter . . . shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law." 33 U.S.C. §2718(a)(2). NSCSA argues that this section allows it to bring state law claims to recoup its expenses. We disagree. NSCSA

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[2] As we noted above, under §1002(d)(2) Moran is treated as a "responsible party" for purpose of the liability cap.

reads §1018(a)(2) too broadly; that section only protects the rights of parties to bring additional claims based on liability that accrues under state law. If NSCSA had itself been damaged by the oil, or if it had been successfully sued by others under state law for damages relating to the spill, then the OPA liability restrictions would not apply.[3] And in this case, NSCSA was not precluded by OPA from bringing a general maritime claim for the loss of fuel and the damage to the SAUDI DIRIYAH's hull. As the district court pointed out, however, "[s]tate law was never imposed to force NSCSA to cleanup the spill or to compensate its victims." *NSCSA*, 924 F. Supp. at 1449. Instead, "NSCSA's liability derived exclusively from OPA." *Id.*

If a responsible party could recoup its OPA liability costs through state law claims as well as through OPA, the cap imposed by OPA §1004(a) would be rendered

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[3] The district court provided an example of such a case:

> Consider, for example, a case where an oil spill causes one million dollars of damage, but the responsible party's liability under OPA is limited to $500,000. If the spill occurred in Virginia, the responsible party may have to pay for the full cost of the spill despite the liability limitation contained in OPA because a person's liability under Virginia's State Water Control Law may be higher than its liability under OPA. . . . If the spill was caused by the negligence of a third party, as it was in this case, it is reasonable to assume that the responsible party may: (1) sue the third party for contribution under section 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law. In this way, the responsible party, whose ultimate liability was not restrained by OPA, could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

NSCSA, 924 F. Supp. at 1449.

meaningless. Congress clearly intended for the cap to apply in situations like this one, since it established that "the liability of the third party shall be subject to the limits provided in section 2704 of the title." 33 U.S.C. §2702(d)(2)(A). Under OPA's limitations on liability, smaller vessels are subject to lesser liability. Even if we disagreed with this policy judgement, we are constrained by the text of the statute.

Because NSCSA seeks to recover costs imposed solely because of its liability under OPA, "the total of the liability [imposed on Moran] under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed" OPA limits – for Moran, $500,000.[4]

IV.

Based on the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

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[4] Because we affirm the limitation of Moran's OPA liabilities to $500,000, we need not discuss NSCSA's argument that the district court should have included the expenses incurred by Turnaboat Services Ltd. as part of NSCSA's expenses under OPA.